In the

Brief &

BRIEF

SUPREME COURT

OF THE

ADELIA YOUNG, CELESTIA YOUNG AND DELECTA PRESTON, APPELLANTS,

vs.

JENNIE ANN, RESPONDENT.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

C. S. VARIAN,
Attorney for Respondent.

W. H. DICKSON,
S. P. ARMSTRONG,
Of Counsel.

(16,395.)

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SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE ESEATE OF OSCAR A. AMY, Deceased.

ADELIA YOUNG, CEDENIA YOUNG AND DELECTA MASTON, APPELLANTS,

vs.

JENNIE AMY, RESPONDENT.

RESPONDENT'S BRIEF.

The record in this case (Trans. p. 1) shows that there were three classes of claimants to the estate of Oscar A. Amy, deceased, each class claiming the whole estate.

First—The appellants, Adelia Young, Cedenia Young, and Delecta Maston, the maternal aunts of Oscar A. Amy, deceased, who were represented in the trial court by Le Grand Young, Esq.

Second—The respondent, Jennie Amy, the widow of Oscar A. Amy, deceased, who was represented in the trial court by S. P. Armstrong and W. H. Dickson, Esqs.

Third—Royal D. Amy, Francis L. Jackson, Ellen R.

Smith, Mary A. Haynes, and Sabia A. Clark, brothers and sisters of the half-blood of Oscar A. Amy, deceased, who were represented in the trial court by Messrs. Pence and Allen.

This third class, being the said half brothers and half sisters of decedent, have not appealed to this court, and are no longer contesting for his estate, it having been determined by the Supreme Court of Utah that the said half brothers and half sisters are not of the blood of the ancestor through whom the decedent, Oscar A. Amy, inherited the property in question, and hence, under the statute of Utah, have no part in the inheritance.

So that in this court the contention is between the respondent, Jennie Amy, on the one hand, claiming the whole estate; and on the other hand, the appellants, who together claim the whole estate as the sole heirs of the decedent.

Oscar A. Amy died intestate May 26, 1891, leaving no issue, and without father or mother or brother or sister of the full blood or blood of the ancestor through whom he inherited this property; therefore, if the respondent, Jennie Amy, is his widow the whole property involved in this suit goes to her under the laws of Utah in force at the time of his death.

Com. Laws Utah, 1888, p. 123, par. 4.

Jennie Amy, the respondent, married the deceased, Oscar A. Amy, on April 4. 1886, and lived with him as

his wife and had two children by him. Both died before the death of her husband. Trans. p. 4.)

Said Jennie Amy was previously, in 1875, married at the age of 16 years to one Elliott Butterworth. It is contended on the part of appellants that she was not legally divorced from this former husband, and hence was not the lawful wife of Oscar A. Amy, deceased.

She instituted proceedings for divorce from the said Butterworth and obtained a decree September 3, 1879, in the Probate Court of Washington County, Utah. (Trans. p. 13.)

THE CASE PRESENTS THIS QUESTION:

Is the decree of divorce valid as against a collateral attack?

If the decree of divorce is valid then Jennie Amy was lawfully married to decendent in 1886, and is now his legal widow, and as such, his sole heir.

EVIDENCE OF THE DIVORCE OFFERED BY JENNIE AMY.

Jennie Amy testified that she brought an action to obtain a divorce from Butterworth (Trans. p. 4-5), and offered certified copies of the complaint and decree, being Jennie Amy's exhibits A and B (Trans. pp. 12-13), showing a verified complaint filed July 16, 1879, in the Probate Court of Washington County, Utah, in the case

of Jane Butterworth against Elliott Butterworth, and the decree dated September 3, 1879.

Said decree contains the following recital: "It also appearing to said Court that said defendant was duly served with process by publication."

No summons was found on file in said cause. To show that a summons was issued, witness testified that she saw the summons in said case at the time the action was pending, and offered in evidence a copy of the Silver Reef Miner, a semi-weekly newspaper, dated July 30, 1879, containing the publication of summons in said case, which summons shows that it was issued July 16, 1879, which paper witness testified had been in her possession ever since said action was pending. (Trans. pp. 5-6.)

Said paper is marked "Jennie Amy's exhibit C. (Trans. p. 14.)

Elliott Butterworth, her former husband, testified that he was a resident of Franklin, Idaho, during and before and after the pendency of said divorce action; that he received a summons by mail in said case, while the same was pending, and at least six copies of said Silver Reef Miner, each containing a publication of said summons; that said papers came to him through the mail, postage prepaid, through the months of July and August, as the same were published; that he clipped said summons out of said papers, five of which he had preserved, and the said five clippings were offered in evidence; it appearing from said clippings that no two had been

clipped from the same issue of said paper. [Trans. pp. 6 to 11.]

Said clippings are marked "Jennie Amy's exhibits D, E, F, G and H." [Trans. pp. 11 and 14.]

Witness Butterworth further testified that he married again in October, 1880, and is still living with his wife, by whom he has seven children.

EVIDENCE TO IMPEACH THE DECREE OF DIVORCE OFFERED BY ROYAL D. AMY, WHO IS NOT A PARTY IN THIS COURT.

Royal D. Amy, for the purpose of impeaching said divorce decree, offered what he claimed to be the judgment roll, consisting of the complaint, decree, affidavit of non-residence, affidavit of mailing paper containg summons to Defendant Butterworth, the minutes of the court, and a copy of the docket of said court, with a certificate of the Clerk that the same are all the papers which are filed in said case.

Mr. Dickson objected to the two affidavits and the minutes of the court on the ground that they are no part of the judgment roll.

On objection of Mr. Young, the whole offer was excluded. [Trans. pp. 14-15.]

Said offer is marked "Royal D. Amy's exhibit 4." [Trans. pp. 15 to 19.]

I.

THE PROBATE COURTS HAD GENERAL JURISDICTION OF DIVORCE CONCURRENT WITH THE DISTRICT COURTS.

By act of March 6, 1852, general divorce jurisdiction was conferred on the Probate Court.

Laws of Utah (1851 to 1870), p. 49.

By act of Congress, June 23, 1874, the Probate Courts of Utah retained jurisdiction in divorce concurrently with the District Courts.

Vol. 18, part 3, U. S. Stat. at Large, Chap. 469, Sec. 3, p. 254.

Com. Laws Utah (1876), p. 53, Sec. 3.

And this jurisdiction was continued by the amendment of the divorce law in 1878.

Laws of Utah 1878, p. 1

Com. Laws Utah (1876), p. 375.

II.

THE DECREE OF DIVORCE WAS IN NO WAY IMPEACHED BY THE APPELLANTS.

The complaint and the decree, made by a Court which had jurisdiction of the subject matter, are suffi-

cient to show a valid divorce. It was not incumbent on the respondent to show the issuance and service of summons; for the decree itself, (reciting "that said defendant was duly served with process by publication") shows that the Court had jurisdiction of the defendant. No attempt was made by the appellants to contradict this recital. The only evidence offered for that purpose was offered by Royal D. Amy (who is not a party to this appeal), and was excluded on the objection of Mr. Young, attorney for appellants. So that appellants in attempting in this court to impeach the decree would fain avail themselves of certain papers which, on their objection, were excluded by the trial court.

III.

THE DECREE WAS MADE BY A COURT OF RECORD.

The law of 1852, as amended by the law of 1878, was in force at the time the divorce action was commenced and decree rendered.

Com. Laws, 1876, p. 375.
Laws, 1878, p. 1.

The organic act provides for Probate Courts, the jurisdiction of which should be as limited by law (with the implied exception of chancery jurisdiction).

Organic Act, sec. 9, Com. Laws, 1876, p. 31.

By the act of February 2, 1852, Probate Courts were given jurisdiction in habeas corpus.

Com. Laws, 1876, p. 371.

Laws of Utah (1851 to 1870) p. 39, sec. 3.

The writ was issued under seal of the Court.

Id. sec. 5.

The act of February 4, 1852, provided for appeals from Justices of the Peace to Probate Court, where the case was to be tried in the same manner as an issue of fact upon an indictment.

Laws of Utah (1851 to 1870), p. 33, sec. 11-22.

And that the record of proceedings had at Coroner's inquest was to be filed in Probate Court.

Id. p. 34, sec. 18.

By act of March 3, 1852, the Probate Court had jurisdiction in the estates of decedents.

Id. page 43, sec. 10-11, chap. 14.

And by another act of same date the Probate Court is recognized as having criminal jurisdiction and a clerk and office in which to file papers.

Id., p. 38, sec. 8.

From all of which it appears that the Probate Court had a clerk and a seal, kept records and an office, and had general jurisdiction over a number of classes of

cases, including criminal, and was therefore a Court of Record.

3 Black. Com. p. 24.

See citations hereafter.

This was the kind of court, in so far at least as the Legislature could confer general jurisdiction, upon which was conferred general divorce jurisdiction by act of March 6, 1852.

Laws of Utah (1851 to 1870), p. 49.

Com. Laws, 1876, p. 375.

This act, it will be noticed, also provided for the disposition of property and children, and also for the Probate Courts to punish by fine and imprisonment.

Secs. 6-8.

The act of December 30, 1852, provided that "all the courts of the Territory shall have law and equity jurisdiction, and that the mode of procedure shall be uniform in said courts."

Laws of Utah (1851 to 1870), p. 34, sec. 1.

And that every court shall preserve its papers and keep record.

Id., p. 35, sec. 9.

The act of 1855 (Judiciary) provides as follows:

Laws of Utah (1851 to 1870), p. 29.

For sessions of Probate Court.

Id., p. 31, sec. 25.

For records of Probate Court.

Id., sec. 28.

It had original jurisdiction in both civil and criminal cases, as well in chancery as at common law, and was governed in all respects as regards practice as District Courts.

Id., sec. 29.

The Probate Judge appointed his clerk to keep a record of the proceedings.

Id., secs. 32-33.

Had power to appoint referees.

Id., sec. 35.

The proceedings of Coroner or Justice of the Peace had, in inquest matters, were returnable to the Probate Court.

Laws, 1868, p. 2, sec. 17.

The civil Practice Act of 1870 (Laws, 1870, p. 17), although not expressly so stated, seems to apply to both District and Probate Courts. At the time it was enacted the act of 1855 had not been repealed or annulled, and the Probate Court is expressly included among the courts which had jurisdiction over certiorari and mandamus.

Laws, 1870, p. 95, sec. 434, p. 96, sec. 445.

See also p. 122, sec. 592.

Where title to real estate was involved in Justice

Court, the Justice must certify the same to the Probate Court, and when so certified "the Probate Court shall have over the action the same jurisdiction as if it were originally commenced therein."

Practice Act, 1870, p. 111, sec. 537.

Abstracts of judgments of Justice's Courts were filed in Probate Court, having the same effect "as if such judgment had been rendered in the Probate Court for such county."

Prace Act, 1870, p. 115, sec. 555.

Appeals from Justice's Court went to the Probate Court where they were tried anew.

Practice Act, 1870, p. 119, sec. 579, 580, et seq.

The Poland Bill (1874) divested the Probate Court of civil, chancery and criminal jurisdiction, excepting in divorce suits, and gave the District Courts concurrent jurisdiction in divorce matters.

Com. Laws, 1876, p. 53, sec 3.

Vol. 18, part 3, U. S. Stat. at Large, Chap. 469, sec. 3.

While it thus lost much of its jurisdiction, it was not reduced to an inferior court. It still remained the same Court of Record or Superior Court with complete unlimited jurisdiction over the class of subjects which were left with it. The Act of Congress even validated and

confirmed all judgments and decrees theretofore rendered by the Probate Court, thus recognizing those Courts as Courts of Record.

Com. Laws, 1876, p. 54, sec. 3.

18 U. S. Stat. at Large, sup.ra.

By the Probate act of 1876, the Probate Court is recognized as having a seal and a clerk.

Com. Laws, 1876, p. 290, sec, 48-50.

Its orders and decrees are recorded.

Id., p. 334, sec. 261.

Its writs issue under seal of the Court and are signed by the clerk; and the practice in the District Court is applicable to the Probate Court.

Id., p. 335, sec. 266-267.

All of which constituted it a Court of Record.

Vassoult vs. Austing, 36 Cal. 696.

McAulay vs. Fulton, 44 Cal. 360.

Robinson vs. Fair, 128 U. S. 87.

I. Elliott's Gen. Pr., sec. 154.

It is not contended that the Legislature by these several acts actually conferred upon the Probate Courts jurisdiction in all the matters which it attempted. Much of this legislation, doubtless, was in conflict with the organic act and other Congressional legislation; but it is instanced here simply as showing the standing and position which the Probate Court held in the eyes of the Leg-

islature; that while the Legislature did not, in so many words, say, "this Probate Court which has been established is a court of record," yet in all legislation from 1852 up to the time the decree of divorce was made, the Legislature in effect said "we are dealing with a court of record—a superior court—a court of general jurisdiction." The manner in which the Legislature, and also Congress, treated the Probate Court speaks forcibly as though, by an express statute the Legislature had said, "we have made the Probate Court a court of Record."

The Supreme Court of Utah finds from these acts, not, as is stated in appellant's brief (p. 47), that Probate Courts had common law, chancery, and criminal jurisdiction, but that "they indicate the purpose of the Legislature to treat them as courts of general jurisdiction." [Trans. bottom p. 31.]

The Probate Court having original general jurisdiction over certain subjects (instance divorce) was for that reason a Court of Record or Superior Court.

Grignon's Lessee vs. Astor, 2 How. 338-341.
Borden vs. State, 54 Am. Dec. 241-2.
Van Fleet's Collateral Attack, sec. 811.

Jurisdiction in divorce matters was conferred on the Probate Courts, concurrently with the District Courts; therefore as to divorce proceedings particularly the Probate Court must be considered a Superior Court.

Beaubin vs. Brinkenhoff, 2 Scam. (Ill.) 270-4.

Cited in People vs. Gilespie, 1 Cal. 344.

Such was the nature of Probate Courts when the divorce law was amended in 1878, under which Probate Courts retained jurisdiction in divorce suits concurrently with the District Courts; and when the decree of divorce now under consideration was rendered.

It is worthy of note that the Supreme Court of New Mexico, under its Organic Act, and Territorial legislation very similar to that of Utah, held that the Probate Courts of New Mexico are courts of record.

Bucher vs. Thompson, 7 New Mex., 115.

See also cases quoted by Judge King in his opinion. [Trans. pp. 32-33.]

The Supreme Court of Utah has ample authority for "regarding Probate Courts as courts of general jurisdiction." In fact, diligent research of counsel for appellants has failed to discover a decision to the contrary.

IV.

PRESUMPTIONS SUSTAIN THE DECREE.

Presumptions are always in favor of a court of record, and jurisdiction will not be questioned collaterally unless there is some part of the record which contradicts the presumption.

Applegate vs. Lexington Mining Co., 117 U. S., 269.

Van Fleet on Col. Attack, sec. 830-1.

Harris vs. Chipman, 9 Utah, 104.

Roach vs. Martin's Lessee, 27 Am. Dec. 756.

Hahn vs. Kelley, 34 Cal. 391.

Skinner vs. Moore, 30 Am. Dec., 158.

Voorhees vs. Bank, 10 Pet. 471-2.

Smythe vs. Henry, 41 Fed. 710.

Cuddy Petitioner, 131 U. S., 285.

Jurisdiction by constructive service is entitled to same presumptions as in the case of personal service.

1. Freeman on Judg. sec. 127.

Van Fleet on Col. Attack, sec. 834.

Essig vs. Lower, 21 N. E. Rep. 1090-2.

Stewart vs. Anderson, 70 Tex. 592.

Hahn vs. Kelley, 34 Cal. 391-417.

Applegate vs. Lexington Mining Co., Supra.

"Where there is some notice although defective, the judgment is not void; if there is notice, although irregular and defective, there is jurisdiction." [Citing a number of cases.] "The rule is the same with respect to notice by publication as to notice by service of summons. * * * It is a mistake to suppose that notice by publication is purely of statutory origin, for it was well known in chancery and at common law." [Citing cases.] "There is therefore no valid reason why the same presumptions

should not obtain in cases where the notice is by publication as where it is by service of summons, and the weight of authority is to that effect." [Citing cases.]

Quoted from an opinion by Justice Elliott.

Quarl vs. Abbott, 1 N. E. 480 (Ind.).

The statute requires, in every cause, that certain acts or facts be made a matter of record. These acts, and these only, can a Court examine in a collateral proceeding. If on such examination, it is found that the record is silent as to some act or fact so required to be made a part of the record, then in aid of the record, the law will presume that what ought to have been done was not only done, but rightly done. And the Court, in a collateral proceeding, cannot go outside of the legal record to look for evidence (that is, affidavits or orders which are not required to be filed, or the minutes of the Court, etc.) for the purpose of contradicting this presumption.

Justice Woods, in the case of Applegate vs. Lexington Mining Co. (117 U. S. 269), considering a judgment had on service by publication and which judgment made no recital as to service of summons, uses the following language: "While it must be conceded that, in order to give the Court jurisdiction over the persons of the defendants, all the steps pointed out by statute to effect constructive service on non-residents were necessary, yet it does not follow that the evidence that the steps were taken must appear in the record, unless, indeed, the

statute expressly or by implication requires it. The Court which made the decree in the case (the record of which was under consideration) was a Court of general jurisdiction. Therefore every presumption not inconsistent with the record is to be indulged in, in favor of its jurisdiction."

Indeed, appellants in the case at bar made no offer of evidence to overcome this presumption. On the contrary, they objected to the offer by Royal D. Amy (who is not a party to this appeal) of certain affidavits and the minutes of the court, made for that purpose. [Trans. pp. 14-15.]

If the offer of these papers made in this manner can now be used by appellants, it then becomes necessary to determine whether or not they are a part of the record; that is whether or not they are admissible to overcome the presumption.

V.

WHAT CONSTITUTES THE JUDGMENT ROLL?

The statute of 1876, providing for publication of summons, does not require the filing of the affidavit or order of publication, hence if there is such requirement we must look for it in some other section of the statute.

Section 1428 (p. 457, Com. Laws of Utah, 1876,) provides:

"Immediately after entering the judgment the Clerk

shall attach together and file the following papers, which shall constitute the judgment roll." The complaint, the summons, with the affidavit or proof of service, and a copy of the judgment.

It becomes important then to know what is meant by "affidavit or proof of service."

This provision was copied from California and embodied in the Practice Act of Utah passed February 17, 1870, (sec. 203) after the Supreme Court of that State had repeatedly held that "affidavit or proof of service" does not include the affidavit or order of publication of summons.

Sharp vs. Dangney, 33 Cal. 512 (decided Oct., 1867).

Hahn vs. Kelley, 34 Cal. 404 (decided Jan., 1868).

Quivey vs. Porter, 37 Cal. 464 (decided April, 1869).

Hence the statute of Utah came to us pregnant of this construction, which construction is binding on the Courts of Utah.

Suth. Stat. Con., sec. 256.

But counsel for appelants would have the courts of Utah follow the construction placed upon the California statute in Galpin vs. Page rather than that of the California courts. If Galpin vs. Page had been decided before the statute was adopted by the Utah Legislature there would be some show of reason in his contention.

We would then have the question as to whether the courts of Utah would be bound by the construction placed upon the statute by the highest court of the State from which it was adopted, or the construction thereof by the Supreme Court of the United States; but the statute was adopted after the courts of California had construed it, therefore such decisions were adopted with the statute and became a part of it as the law of Utah. When so adopted as a part of the law of Utah, it so stands unaffected by any subsequent construction of the patent statute by any other court, even the Supreme Court of California or of the United States.

Daniels vs. Clegg, 28 Mich., 44.
Attorney-General vs. Brunst, 3 Wis., 692.
Hess vs. Pegg, 7 Nev., 27.
Harrison vs. Sager, 27 Mich., 477.
Greiner vs. Klein, 28 Mich., 21.
Cooley's Const. Lim., p. 66 and note 1.

Besides the statute defined "proof of service" as follows: "In case of publication, the affidavit of the publisher, his foreman, or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the postoffice, if the same shall have been deposited."

Com. Laws, 1876, p. 410, sec. 33.
(Laws of Utah, 1851-1870) Practice Act, sec. 33, p. 23.

By amendment, the affidavit and order of publica-

tion were, in 1882, required to be made a part of the judgment roll in addition to the "affidavit or proof of service."

Laws, 1882, p. 78, sec. 25.

But the latest expression of the Legislature on this point repeals the amendment and strikes the affidavit and order of publication out of the judgment roll.

Revised Stat. of Utah, 1898, sec. 3197.

Later legislation is important as showing the legislative interpretation of earlier laws.

Cope vs. Cope, 137 U. S., 688.

Being no part of the record, the Court will not look to see whether the affidavit and order of publication fulfill the requirements of law or whether they were filed or not. They will not be considered when the judgment is attacked collaterally; and cannot be used for the purpose of overcoming the presumption of regularity.

In applegate vs. Lexington Mining Co. (supra.) Justice Woods says: "The result of the authorities and what we decide is that where a Court of general jurisdiction is authorized in a proceeding, either statutory or at law or in equity, to bring in by publication or other substituted service, non-resident defendants interested in or having a lien upon property lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the Court orders such substituted service, it will be presumed in favor of the jurisdiction that ser-

vice was made as ordered although no evidence thereof appears of record, and the judgment of the Court, so far as it affects such property will be valid."

See also Hall vs. Law, 102 U. S., 463.
Harvey vs. Tyler, 2 Wall, 344.
Galpin vs. Page, 1 Saw., 321.
In re Newman, 75 Cal., 220.
Also the California cases last above cited.

In Hahn vs. Kelley (34 Cal. 404) the affidavit and order of publication were offered for the purpose of contradicting the presumption of legal service, on which judgment had been rendered, in a record being considered by the Court.

The Court says: "So, for the purpose of determining whether a want of jurisdiction is shown by the record, we can look only to the summons, the affidavit of the printer, the complaint, with the default indorsed thereon, and the judgment. The affidavit of Hawes, made for the purpose of obtaining an order for publication, and the order of the Court directing publication, for all the purposes of the question before us, must be disregarded, or in other words, presumed to have been all that the law requires."

Accordingly the Supreme Court of Utah, construing the words "affidavit or proof of service" in the light of the definition thereof given in section 33 of the Practice Act (Laws, 1876, p. 410) and of the construction placed on

these words by the Supreme Court of California and which construction was adopted by the Legislature of Utah along with the statute taken from California, held that the affidavit and order for publication are not included in the phrase "affidavit or proof of service," and therefore not a part of the judgment roll, and not to be looked to in determining whether or not the record shows jurisdiction.

They cannot be used to overthrow the presumption that serivce was had on the defendant.

However, in the case at bar, the judgment has a much stronger foundation than the bare presumption of regularity.

VI.

THE RECITAL IN THE DECREE AS TO SERVICE IS CONCLUSIVE.

Jennie Amy is not compelled to rely in this case upon presumptions to sustain the decree of divorce.

The Probate Court passed upon the evidence or proof of service, and found "that said defendant was duly served with process by publication." That finding is conclusive on collateral attack unless other parts of the record show that such finding cannot be true. This rule is particularly forceful when the attack is made in a domestic court.

In Brickhouse vs. Sutton (6 Am. St. Rep., 501), the Court says: "Every intendment is in favor of the action of the Court and its sufficiency. The ascertainment and recital of facts in the record by the Court imports verity and binding effect, and must be so treated for all proper purposes of the action, until in some proper way the action of the Court shall be successfully impeached. Thus in this case it must be taken that the Court, acting upon proper evidence, ascertained and set forth in the record the important fact that the defendants in the proceeding in question were served with the process against them—that is, served regularly, effectually."

In Goodell vs. Starr (127 Ind., 200), the Court follows Judge Elliott's decision above quoted: "The cases of Quarl vs. Abbott (Supra, and others cited) lay down that which we regard as the correct rule on that subject. When notice is given by publication the judgment of the Court acting upon such notice, that the publication and the affidavit upon which it is based, are sufficient to give it jurisdiction is conclusive upon all the parties as against a collateral attack."

In Goodwin vs. Sims (11 Am. St. Rep. 25), the Court lays down the rule as follows: "The rule deducible from these decisions is that when the Court, by the recitals of the decree, ascertains the jurisdictional fact, such adjudication is final and conclusive when the decree is collaterally assailed; and if the decree is silent, the jurisdictional fact may appear from other parts of the record.

As the entire record imports absolute verity, the recitals of the decree may be explained, limited or qualified by other parts of the record. The entire record may be looked to for the purpose of ascertaining the jurisdictional facts, when there is no finding by the Court; for jurisdiction is acquired from the facts as they appear in the entire record; but when the power to ascertain the jurisdictional fact is conferred on the Court, and the Court adjudges that it has jurisdiction, it is not overcome or destroyed because other parts of the record may not be sufficient to uphold such finding."

The opinion of the Supreme Court of Utah, and the decisions therein quoted from, are instructive on this point.

Trans. pp. 37-38-39.

The rule that recitals in the decree are conclusive on collateral attack is further shown by the following authorities:

I. Ellitt's Gen. Pr., sec. 260-261, p. 329.

1 Black. on Judg., sec. 273-4-287.

1 Freeman on Judg., sec. 126-130-2, 4th Ed.

Hall vs. Law, 102 U. S., 464.

Adams vs. Cowls, 6 Am. St. Rep., 76 (Mo.).

Kinney vs. Lewis, 2 Utah, 517.

Callen vs. Ellison, 13 Ohio St., 454.

Shawhan vs. Loffer, 24 Iowa, 226.

North Pac. Cycle Co. vs. Thomas, 38 Pac., 307.

Foster vs. Givens, 67 Fed., 691.
Dillon vs. Kan. City Ry Co., 43 Fed., 108.
Harris vs. McClanahan, 11 Lea (Tenn.), 185.
Nash vs. Church, 10 Wis., 303-312.
Sschweitman vs. Noble, 75 Iowa, 120-2.
Rotch vs. Humboldt College, 56 N. W. Rep., 658.
Blaesdell vs. Kean, 8 Nev., 308.
Davis vs. Robinson, 70 Tex., 397.
Treadway vs. Eastburn, 57 Tex., 212.
Lawler vs. White, 27 Tex., 250-5.
Waterhouse vs. Cousins, 40 Me., 333-5.
Roderigas vs. East River Sav. Inst., 63 N. Y., 460.
Betts vs. Bagley, 12 Pick., 581.
Isaacs vs. Price, 2 Dill, 351.

In a leading case (Hahn vs. Kelley, 34 Cal., 407, the Court fully and ably discusses the force to be accorded to presumptions from silence of the record as well as the effect of recitals in the decree:

"We consider the true rule to be that legal presumptions do not come to the aid of the record except as to acts or facts touching which the record is silent. Where the record is silent as to what was done, it will be presumed that what ought to have been done was not only done, but rightly done; if the record merely shows that the summons was served on the son of the defendant, it will not be presumed that it was served on the defend-

ant. If the affidavit of the printer shows that the summons was published one month, it will not be presumed that it was published three. To avoid any misapprehension, we deem it proper to add that, so far, we have assumed, for the purpose of the argument, that the record, aside from that portion of it which is denominated the proof of service, is silent upon the question of service. But it may happen that other portions of the record may also speak upon that question. If so what they say is not to be disregarded. On the contrary, in determining the question whether a want of jurisdiction is apparent upon the face of the record, we must look to the whole of it and report the responses of all its parts. To illustrate: Suppose that portion of the judgment roll denominated the "affidavit or proof of service' shows that personal service was made upon the son of defendant, and the remainder of the roll says nothing about service. We then have a want of jurisdiction appearing upon the face of the record. But suppose the judgment states that the defendant appeared, or that personal service was made upon him, or something else that is equivalent, as it frequently does, the opposite result follows, for the record cannot lie, and it appears that the father as well as the son had been served, which may well have been the case.* * * So in the case of a service by publication, if the affidavit of the printer states that the summons was published one month, and yet the Court in its judgment states that it was published three, or that service

has been had upon the defendant, it will be presumed that other proof than that contained in the judgment roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it."

The Supreme Court of the United States states the same rule of law: "Probate Courts being then courts of superior jurisdiction in respect to the settlement, distribution and partition of estates coming within their cognizance, the recitals in the decree of partition, unless contradicted by the record, will be presumed to be correct, and every intendment will be indulged in its support."

Robinson vs. Fair, 128 U. S., 53-87.

VII.

THE AUTHORITIES CITED BY APPELLANTS ARE NOT IN CONFLICT WITH THE POSITION HEREIN MAINTAINED.

Counsel for appellants burdens his brief with authorities to the point that the defendant must be served with summons in the manner provided by law.

Respondent has no quarrel with this proposition. What I do maintain is: First—That when a judgment of a Court of general jurisdiction is attacked collaterally it is presumed, in the absence of anything appearing in the

record to the contrary, that the Court had obtained jurisdiction of the defendant. Second—That when such judgment is attack collaterally in a domestic court, a recital of service in the judgment is conclusive, unless some other part of the record contradicts the recital.

In the case at bar appellant offered no part of the record and no evidence dehors the record, even to overcome the presumption. Even if this Court could consider papers which are not a part of the record and which were excluded by the trial court on the objection of appellants and should look into all the papers pertaining to the case of Butterworth vs. Butterworth, still the recital would stand uncontradicted. They do not show that the recital was false.

Counsel for appellants quotes copiously from a number of cases on the question of presumptions, but the cases fairly considered uphold the proposition that presumptions support the jurisdiction, when the decree of the court is attacked collaterally, unless contradicted by some other part of the record. Galpin vs. Page, his leading case, holds that when the record shows that the defendant was out of the jurisdiction, the presumption ceases, but in this particular the case of Applegate vs. Lexington Mining Co., (117 U. S., 269) refuses to follow Galpin vs. Page.

I believe that none of the cases cited in appellants' brief, and that no well-considered or leading case, contradicts or varies the rule that the recital in the decree

"that said defendant was duly served with process by publication" is conclusive when attacked in a collateral proceeding in a domestic court.

In Settlemier vs. Sullivan the decree introduced in evidence was rendered in an action not in rem, but purely in personem (97 U. S. 447). The Court held that the record shows that service was made on the wife of defendant, and that there was no return that defendant could not be found to be personally served; also that the decree did not recite any facts from which any other service must be inferred. (Id. p. 449). The recital was contained in the minutes preceding the entry of judgment, (Id. p. 445), which seems to have been entered by the Clerk and not by the Court.

See also dissenting opinion.

The amount of the judgment upon which the land had been sold was insignificant as compared with the value of the property sold, so that the equities were best subserved by holding the decree void.

In Cheely vs. Clayton the decision is based on the statute of Colorado, which is very different from that of Utah, and which the highest court of Colorado had construed and held, under similar cirsumstances, that the Court acquired no jurisdiction and that the decree was void. (110 U. S. 707.) Indeed the decree then under consideration had already been passed upon by the Supreme Court of Colorado and held void (Id. p. 708). The decision was based wholly upon the construction which the high-

est Court of Colorado had given to the statute of that State (Id. p. 709) and upon its decision upon the very judgment in question (Id. p. 708). Besides it affirmatively appeared from other parts of the record that the recital in the decree as to service could not be true.

The disputants in that case in the beginning were the first and second wives of decedent, each claiming to be his widow. He had two children by his first wife, but no issue by the second. The second wife died pending the hearing in the Supreme Court, her heirs being substituted. (Id. p. 704.)

Here again we have the equities in favor of the first wife as against the collateral heirs of the second wife, and the decree accordingly held void, thus giving the property to the first wife.

Galpin vs. Page is not applicable to the case at bar. In the first place the decree introduced in that case had been reversed by the Supreme Court of California on the ground that the service was not sufficient (18 Wall 355) to give jurisdiction. This was held conclusive and the Supreme Court of the United States refused to consider facts as to service (p. 365-373). The decree would still have been held good as to the rights of third parties having equitable interests); thus showing that the Court treated it, in fact, as only voidable (Id. p. 373-4).

The proceeding in which the decree was had was not treated as a proceeding in rem, otherwise the presumption would have been in favor of the decree. (Id. p. 371).

The decree in that case did not find (as the decree in the case at bar, viz. Butterworth vs. Butterworth), that service was duly had. If it had affirmatively appeared from some part of the record by proper averment, the decree would not have been deemed void. (Id. p 366.)

The action was between citizens of different States, and therefore the judgment was not deemed that of a domestic court.

To have held that decree valid would have deprived a party, who was a minor at the time service was had, of his inheritance, so that the equities were upheld by holding the decree void.

Thompson vs. Whitman, considers a judgment which was rendered in a special proceeding as well as in a foreign State and the cases cited therein seem to have been treating of judgments rendered in foreign States.

In Noble vs. Union River Logging Ry., the question of the effect of recitals in the decree was in no way before the Court, it was a question of the effect of presumptions merely, and so in the case of Guaranty Trust Co. vs. Green Cane Ry.

Graham vs. Spencer and also Walbur vs. Abbott considered judgments which contain no recital; and Cissell vs. Palaski considered a judgment rendered in a special proceeding; so in Martin vs. Barbour, and in passing on the validity of a tax sale at that.

Romain vs. Union etc. Co. was a direct proceeding.

In re Sawyer the question of service of process was

not before the Court; so in Ellitt vs. Piersoll; so in Hickey's lessee vs. Stewart.

In the case of Gray vs. Larimore the judgment which was being considered contained no recital as to service. So in the case of Noves vs. Butler.

As to the early California cases cited, those in the 12 Cal., 100, and 26 Cal., 149, do not pass on the question of recital; while the case of Steinbeck vs. Leese was considered by the Court, and the case of Forbes vs. Hyde was expressly overruled by Hahn vs. Kelly on the ground that the question of the affidavit and order for publication not being a part of the record was not called to the attention of the Court, and that therefore the Court had not considered the matter in deciding that case.

The authorities, particularly the Supreme Court of the United States, justify the position that the Court will not be over-zealous to hold a divorce proceeding void where all the equities are on the side of the widow, Jennie Amy, as against remote relatives of decedent.

VIII.

ALL THE PROCEEDINGS CONSIDERED, WHETHER IN THE RECORD OR DE HORS THE RECORD, STILL THE DECREE IS VALID AS AGAINST COLLATERAL ATTACK.

Jennie Amy offered the complaint and the decree

which contained the recital as to service. These in themselves were sufficient to establish the divorce. In addition to this she offered a copy of the summons as published in the newspaper, the original not having been found among the files in said case. She also showed by testimony that a summons was issued, and that the defendant received the summons through the mails as well as six copies of said newspaper containing publication of summons in said case.

This evidence was admissible as showing that the steps pointed out by the statue were followed.

Applegate vs. Lexington Mining Co., 117 U. S. 268.

Even if the Court in the case at bar could go outside of the judgment roll, and back of the finding of the Probate Court, "that said defendant was duly served with process by publication," for the purpose of considering the alleged irregularities in the service of summons, and could consider papers which were excluded from the record in this case on the objection of appellants when the same were offered by Royal D. Amy, who is not a party to this appeal, it would still find that the alleged irregularities are not such as to render the decree void. They are matters which can only, if at all, be attacked in a direct proceeding brought for that purpose.

The sufficiency of the affidavit for service of summons by publication was a matter to be determined by the Court.

Com. Laws 1876, p. 409, sec. 30.

And such determination is conclusive when attacked collaterally.

Pennoyer vs. Neff, 95 U. S. 721.

Pettiford vs. Zoellner, 45 Mich. 362.

The summons and order for publication and affidavit of publication of summons which do not appear among the files are presumed to have been lost, and to have been regular in form.

Freeman on Void Judicial Sales, sec. 8, p. 17.

Hurley vs. Barnard, 48 Tex. 83-87.

Wilson vs. Holt, 83 Ala. 540.

The sufficiency of the affidavit of the printer as to publication of summons and of the affidavit of mailing summons, which was offered by Royal D. Amy, (Trans., p. 17) cannot be questioned collaterally; for the Statute of Utah provides, that from the time service is had, the Court acquires jurisdiction, and has control of all subsequent proceedings.

Com. Laws 1876, p. 411, sec. 35.

It is the fact of service, not the proof which gives the Court jurisdiction.

Wood vs. Blythe, 46 Wis. 655.

Kipp vs. Fullerton,4 Minn. 480.

Pierce vs. Butlers, 21 Kans. 106.

In Re Newman, 75 Cal. 220.

Fanning vs. Krapfl, 68 Iowa 248.

The Court has power to order amendment of proof of service.

Freeman on Judg., sec. 127, (last paragraph).

Therefore the Court must have jurisdiction of the cause.

So that considering all the proceedings in the divorce case in the Probate Court, whether a part of the record or not, and whether in evidence in the case at bar or not, nothing is found which contradicts or is inconsistent with the recital in the decree "that said defendant was duly served with process by publication."

IX.

COLLATERAL ATTACK IS NOT FAVORED.

Collateral attacks on Judicial proceedings are never favored, and unless it is conclusively shown that the Court had not jurisdiction, or that it transcended its jurisdiction, its judgment will be held to be valid.

Head vs. Daniels, 38 Kans. 12.

Particularly is this the rule where the equities of the case are all on the side of the party attempting to sustain the decree. When such is the case, a most liberal construction will be given in favor of the decree.

Ogden vs. Walters, 12 Kans. 235.

Gunnell vs. Rice, 13 Minn. 406.

X.

THE COURTS UPHOLD DECREES OF DIVORCE.

The subject matter in suit for divorce is the status of the party domiciled within the jurisdiction of the Court.

11 Bish. Marriage, D. & S., Chap. VI., with note to sec. 152.

11 Black on Judg., sec. 925-931-2.

As domicile is what confers jurisdiction in divorce, it matters not, in adjudicating the status, whether the defendant has notice of the proceedings or not, unless a notice is prescribed by statute.

11 Bish. M. D. & S., sec. 76-138-157.

Maynard vs. Hill, 125 U. S. 209.

Pennoyer vs. Neff, 95 U. S. 734.

Thus the law makes a distinction between jurisdiction of the status, and jurisdiction of the party defendant; and even in the case of foreign judgments, while a recital in the record as to domicile is not conclusive, yet a recital as to service of notice is conclusive.

11 Bish. M. D. & S., sec. 184.

Wallace vs. Brown, 76 Am. Dec. 425 (Ark.).

See also Borden vs. State, 54 Am. Dec. 242.

Hence, we find the decisions almost uniform in upholding decrees of divorce when the Court had jurisdiction of the subject matter, even though the service of process was very irregular.

Butterworth himself could not question the validity of the divorce at this late day.

Crosby vs. Probate Court, 3 Utah 52.
Vorhees vs. Bank, 10 Pet. 472.

By his second marriage and long acquiescence he has affirmed and validated the decree even if it were invalid when rendered.

Reno on non-Residents, p. 317-8.
Loud vs. Loud, 129 Mass. 18.
Colton vs. Rupert, 60 Mich. 329.
Dunn vs. Dunn, 4 Paige 430.
Singer vs. Singer, 41 Barb. 140.
Nichols vs. Nichols, 25 N. J., Eq. 65.

By action brought within reasonable time he might have attacked the decree, only by direct proceedings for that purpose.

Hendrick vs. Wittemore, 105 Mass. 26.
Henderson vs. Standford, Id. 506.

And the plaintiff cannot impeach the judgment after obtaining the decree.

Hendrick vs. Whittemore, Supra.
Henderson vs. Stanford, Supra.

Lapham vs. Briggs, 27 Vt. 35.

Ellis vs. White, 61 Iowa 646.

That is, Mrs. Amy could not now claim to be the wife of Butterworth, nor could Butterworth claim to be her husband. A husband without a wife, or a wife without a husband does not exist in reason or law.

1 Bish. M. D. & S., sec. 698 et seq. 837.

11 Bish. Id., sec. 137-153-154.

Richardson vs. Simons, 47 Mo. 26.

Marriam vs. Wolcott, 61 How. Pr. 393.

Can a stranger to the record now be heard to say that Mrs. Amy and Elliot Butterworth are husband and wife?

Skinner vs. Moore, 30 Am., Dec. 157.

Is their status that of single man and woman so far as they themselves are concerned, but that of husband and wife so far as third parties are concerned? Do irregularities, the carelessness of some attorney, or the Clerk of some Court, so juggle with the law as to deprive them of the right of inheritance from each other, because neither one can claim to be the spouse of the other; and at the same time deprive them of the right of inheritance from others, because some third party can claim that they are husband and wife? Will the law bastardize the children of Butterworth, the issue of his second marriage? To prevent just such manifest injustice we find

the Courts more liberal in sustaining decrees of divorce than in other cases.

After great lapse of time any reasonable presumption of fact will be conclusively indulged in order to sustain a decree of divorce.

Wilson vs. Holt, 83 Ala. 540.

1 Bish. M. D. & S., sec. 77, 956-8, 1148-9.

Reasons of public policy favor the upholding of the validity of divorce where there is subsequent marriage of the parties.

1 Bish. M. D. & S., sec. 1148.

Wilson vs. Holt, Supra.

Maynard vs. Hill, 125 U. S. 204-8.

XI.

THE BARE PUBLICATION OF SUMMONS FULFILLED ALL THE REQUIREMENTS OF THE LAW.

The Statute of Utah in force at the time the decree was rendered provided two methods of getting substituted service on a non-resident defendant. One by publication of summons by the order of Court made on affidavit. The other mode, by publication of a notice, no affidavit or order being required. Such notice was required to be made in a newspaper printed in and having a gener-

al circulation in the Territory, and to be inserted four times consecutively, the first insertion to be at least forty days before the time to answer, and a copy to be immediately mailed to the defendant. The act of February 19, 1869 (Laws of Utah 1869, p. 19) provides; sec. 4: "If any defendant is a non-resident of the Territory, and has an agent in the Territory, service may be had upon him, by serving the same upon his agent, or by leaving a copy thereof at his usual place of business, with any person in charge thereof. Where any defendant is a non-resident, or his residence is unknown, and has no known agent or place of business in this Territory, service of process may be had by publication in some newspaper printed in and having a general circulation in said Territory. Said publication must contain the names of the parties, plaintiff and defendant, to the complaint; a statement of the object thereof, the name and style of the court in which the same is filed, and also notify the persons thus to be served, when they are required to answer. Said publication shall be inserted four times consecutively; the first insertion to be at least forty days before the time of answer, and a copy of which shall be immediately deposited (post paid) in the postoffice, directed to the defendant or defendants at their last known place of residence or business."

The State of Nevada had a different method of getting constructive service.

The Legislature of Utah, in formulating the Practice Act of 1870, ingrafted the Nevada statute on the

existing statute of Utah above quoted. Immediately preceeding the Utah Statute of 1869, they joined the following portion of the Nevada law: "When the person on whom the service is to be made resides out of the Territory, or has departed from the Territory, or cannot after due diligence be found within the Territory, or conceals himself to avoid the service of summons, or being a corporation or joint stock association, cannot be served as provided in sec. 29, and the fact shall appear by affidavit to the satisfaction of the Court or Judge thereof, and it shall in like manner appear that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such Court or Judge may grant an order that the service be made by publication of the summons. The order shall direct the publication to be made in a newspaper to be designated as most likely to give notice to the persons to be served."

Laws of Utah 1870, p. 22. (Practice Act.)

Com. Laws 1876, p. 409, sec. 30.

And first sentence of sec. 31.

Immediately succeeding the Utah Statute of 1869 they joined the following portion of the Nevada law: "In actions upon contracts for the direct payment of money, the Court in its discretion may, instead of ordering publication, or may after publication, appoint an attorney to appear for the non-resident, absent or concealed de-

fendant, to conduct the proceedings on his part."

Id. last sentence of sec. 31.

Thus the Legislature retained the method by publication of notice, without an affidavit and order, and adopted the additional methods from Nevada, of publication of the summons by order of the Court, and of the appointment of an attorney to represent the defendant, in which case no publication need be made. In case the Court ordered publication, no mailing of the copy to the defendant was required; but in case a notice was published without an order of Court then a copy must be mailed to the defendant. Sec. 33 of the Practice Act recognizes the fact that the summons need not be mailed in all cases.

Sec. 33. "Proof of the service of summons shall be as follows: First. * * * Second. In case of publication, the affidavit of the publisher, his foreman or principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the postoffice, if the same shall have been deposited." * * *

The intention of the Legislature by these amendments was clearly to provide for cases not within the act of 1869, and to provide other and additional modes of acquirising jurisdiction without repealing or modifying the mode which was provided by act of 1869.

The Statute of 1869, in the case at bar, has been more than complied with. It did not require the issuing

of a summons even; all that was required was the publication of a notice four times—the first publication to be at least forty days before the time for answer—and the mailing of a copy to the defendant. In this case the summons itself was published, which was sufficient as a notice under the Statute.

The Legislature can provide for the giving of notice in whatsoever manner it sees fit.

II. Bish. M. D. & S., sec. 141.

See Maynard vs. Hill and Pennoyer vs. Neff, Supra.

XII.

APPELLANTS' BRIEF MISINTERPRETS THE OPINION OF THE SUPREME COURT OF UTAH.

Counsel for appellants, in his brief, shows great agility in demolishing numerous men of straw which his imagination espys in Judge King's opinion in this case.

Some of the more important points wherein he misinterprets the language of the Court may be worthy of notice.

The Court does not decide, as stated in appellant's brief (p. 13), that a defective record can be cured by oral testimony; nor that a recital of service is conclusive although such recital is disputed by the record.

Nor does the Court decide, as stated on page 14 of brief, that an order for publication and affidavit of the printer are not necessary. Yet if the Court had found that the publication could be made without an affidavit or order of Court therefor, such finding would have been in harmony with the Statute of 1869 above quoted.

Nor does the Court recognize any defect in the judgment when it comments on the parol evidence offered by Jennie Amy. While the Court will presume (if a summons is held to be necessary) that a summons was duly issued, the record being silent; yet it does not follow that the Court will exclude secondary evidence, that is, a copy of the summons, to supply that which is lacking in the record.

Lowry vs. Cady, 4 Vt. 505.

Applegate vs. Lexington Mining Co., Supra 268.

The testimony of Butterworth was admissible to show that he had notice of the pendency of the divorce, and that he acquiesced in, and assumed a new status relying upon the decree; and also to show that the summons was published.

The assignment of errors also designates that as error wherein the Court is not guilty. The Court did not, as specified in assignment No. 13, throw the burden on appellants to show that the divorce is void.

The Court did not, as assigned in No. 19, admit Royal D. Amy's "exhibit 4." This offer was excluded on objec-

tion of Mr. Young. Notwithstanding this fact, he now relies upon it as his only evidence to impeach the decree, and in the face of such reliance complains because, as he alleges, it was admitted.

As hereinbefore stated the Court did not hold that an order of publication is unnecessary; nor that the Probate Court ever possessed common-law or chancery jurisdiction. (See Assignments 21-23 appellants' brief, p. 17.)

There is nothing in the record, nor was there any evidence offered tending to show, nor did the Clerk of the Probate Court certify that there never was an order for publication of summons, although this is broadly stated in appellants' brief, p. 21-37.

In the certificate to "Royal D. Amy's exhibit 4," which was excluded on objection of Mr. Young, the Clerk certifices that said exhibit contains the "whole record in said cause," and "that the foregoing are all the papers which are filed in said cause." (Trans., p. 19.) This exhibit does not contain any order for publication. Presumably this is the foundation for Mr. Young's bold statement that there never was an order and that the Clerk so certifies.

Again appellants' brief (p. 45) puts the Supreme Court of Utah in the position of holding that a recital of service in the decree cannot be questioned collaterally under any circumstances. The holding of the court is very plainly and tersely stated in the opinion (Trans., p. 44), as follows: "Accordingly we are of the opinion that

the affidavit upon application for order of publication and the order based thereon, under the Compiled Laws of 1876, are not a part of the record, and their existence or non-existence cannot be appealed to in this collateral attack to impeach the verity of the record; that the recital of service of process not being contradicted by anything appearing in the judgment-roll, the presumption is that the Court acquired jurisdiction of the defendant, and in this collateral proceeding the decree of divorce there rendered is unassailable and conclusive."

We respectfully submit that the Supreme Court of Utah has stated the law as it is, and as in reason, and in justice to the widow of decedent, it ought to be.

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